



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT ELECTION PETITION NO. 5 OF 2017

SHUKRA HUSSEIN GURE.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....1ST RESPONDENT

THE COUNTY RETURNING OFFICER OF

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....2ND RESPONDENT

ANAB GURE MOHAMED.....3RD RESPONDENT

RULING

1. The Petitioner, Shukra Hussein Gure was one of the candidates who contested the National Assembly seat for the women Representative, Garissa County in the 2017 General Elections that were conducted by the 1st Respondent, Independent Electoral & Boundaries Commission. The 2nd Respondent was the County Returning Officer. The 3rd Respondent Anab Gure Mohamed was the winner of the said position. The Petitioner was dissatisfied with the way the election was conducted and filed this petition.

2. The application dated 13th December, 2017 was filed by the 3rd Respondent. The application is brought under Section 76 of the Elections Act 2011, Sections 5 and 7 of the Oaths and Statutory Declarations Act, Rule 7 of the Oaths and Statutory Declarations Rules, Rules 5, 8(4)(b) 12(2) & (3), 15(2) and 19 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and all other enabling provisions of the law .

3. The application seeks the following orders:

(1)That pursuant to permission of the Court granted on 13th December, 2017, this application, raising new issues of jurisdiction that have recently arisen, be admitted for immediate hearing under rules 5,19 and the exception to Rule 15(2) of the elections (Parliamentary and County Elections) Petitions Rules, 2017, and the same be deemed properly on record;

2. That the following affidavits filed in support of the petition on 5th September, 2017 be struck out:

2.1. The affidavit of Shukra Hussein Gure filed on 5th September 2017;

2.2. The affidavit purportedly of Yussuf Ahmed Muhumed filed on 5th September, 2017;

2.3. The affidavit of Ismael Mohamed Abdi filed on 5th September, 2017;

2.4. The affidavit of Sadiq Mohamed Gedi filed on 5th September, 2017

2.5. The affidavit/certificate of electronic Evidence of Idris Omar Abdi filed on 5th September, 2017;

2.6. The Further affidavit of Shukra Hussein Gure filed on 27th November, 2017;

4. The application is predicated on the following grounds:

1. That the documents listed in (2) above were not sworn before the alleged Commissioner for Oaths, and are therefore non-affidavits that must be struck out under the mandatory provisions of Section 5,7 of the Oaths and Statutory Declarations Act, Rule 7 of the Oaths and Statutory Declarations Rules, and Rules 8(4) (b), rule 12(2), (3), (6) and (12);

2. That pursuant to the limitations under Section 76 of the election Act and in the absence of competent affidavits to support the petition, the petition dated and filed on 5th September, 2017 must be struck out with costs to the 3rd Respondent;

5. The application is supported by the affidavit sworn by Daniel Ngaca Gacugia, the Advocate handling this petition on behalf of the firm of Ms. Wetang'ula, Adan & Co. Advocates for the 3rd Respondent. It is stated that in the course of the proceedings herein, on 6th December, 2017 defects were noted in the affidavit in support of the petition sworn by one Yussuf Ahmed Muhumed which was signed by a different person by the name Abdiaziz Yussuf Osman purportedly sworn at Garissa before a Commissioner for Oaths, Ian M Mbuthia.

6. That there were doubts whether the said Commissioner for Oaths (hereinafter Commissioner) had commissioned the said affidavits and the 3rd Respondent's side applied that the affidavit of the said Yussuf Ahmed Muhumed be struck out and that the said Commissioner be present during the hearing of the petition. That the Petitioner's counsel objected to the application and the court directed that the said Commissioner do file an affidavit to explain the matter raised concerning the affidavit of Yussuf Ahmed Muhumed and that the Commissioner be summoned for cross examination. That the Petitioner's counsel thereafter applied for the affidavit of Yussuf Ahmed Muhumed to be withdrawn or struck out as it was not essential to the Petitioner's case. That the court struck out the said affidavit and ruled that the said affidavit having been struck out, there was no need to summon the said Commissioner.

7. That due to the above developments, the counsel for the 3rd Respondent who still harboured doubts wrote to the aforesaid Commissioner and forwarded to him the affidavits sworn in support of the Petition and sought a clarification whether the affidavits were Commissioned by him on 5th September, 2017 at Garissa. It is stated that the said Commissioner in a letter dated 11th September, 2017 replied that he was not in Garissa on 5th September, 2017 and did not sign or commission the affidavits in question nor met the deponents. That the said Commissioner also swore an affidavit to that effect and filed the same in court.

8. It is contended that in the premises, the affidavits in question must be struck out as the issue goes to the jurisdiction of the court to hear the Petition on merits. That consequently, the Petition herein is fatally defective and should be struck out with costs to the 3rd Respondent.

9. The 1st and 2nd Respondents filed a replying affidavit in response to the application. The 1st and 2nd Respondents supported the application dated 13th December, 2017. It is stated that the pre-trial stage had

not yet been closed as there is a pending application filed by their side. It is further stated that rule 15(2) of the Elections Petitions Rules is not applicable as the matters raised in the application at hand could not have been brought earlier. That it is clear from the affidavit of the Commissioner that the affidavits the subject of the application are forgeries and contravene the provisions of Section 5 & 7 of the Oaths and Statutory Declarations Act, the Elections Act and the Elections Petitions Rules. It is further stated that forgery of affidavits is a criminal offence under Section 345 of the Penal Code. That the said affidavits should be struck out and as a consequence the petition herein be struck out.

10. The application is opposed by the Petitioner as per the grounds of opposition filed herein dated 17th December, 2012. The grounds are that:

1. The application as filed is time barred having been brought after closure of pre-trial conference pursuant to rule 15(2).

2. The Application is malicious, vexatious and an abuse of the court process purely meant to stall the hearing of the petition on merits.

3. The application is a continuation of overreliance by the 3rd Respondent on procedural technicalities.

4. The mistake if any (and which is denied) is excusable under article 159(2)(d), Section 80(1) (d) of the elections Act, and rule 4 and 5 of the Election (Parliamentary and County) Election Petition Rules.

5. The Applicant shall therefore pray that the said application be struck out with costs.

11. A replying affidavit was filed by the Petitioner, Shukra Hussein Gure in opposition to the application. Two other affidavits were filed by Feisal Bare Hassan, a supporter of the Petitioner and by Idriss Omar Abdi, husband to the Petitioner.

12. In the replying affidavit by the Petitioner, it is stated that the application is vexatious, malicious and an abuse of the court process meant to undermine electoral justice. It is stated that the application is time barred having been brought late in the day after the closure of the pre-trial conference. That regarding the issues raised in the application, the court is *functus officio* as the court has already delivered a ruling in respect of the Petitioner's affidavit in support of the petition which ruling the 3rd Respondent purports to appeal or review before the same court through the back door. That the 3rd Respondent had the opportunity to have the Commissioner confirm the attestation of the signatures when the Petitioner was earlier on cross examined on the same but failed to do so and cannot now seek to have a second bite of the cherry.

13. It is further deposed that the 3rd Respondent has based the filing of the application at hand on the affidavit signed by Abdi Aziz Yusuf Osman which affidavit has already been withdrawn. It is averred that the Commissioner was present when the Petitioner executed the affidavit and that the Petitioner can identify him. The 3rd Respondent is accused of reaching out to the Petitioner's witnesses in a bid to compromise them. It is stated that the application herein is based on false information and is made to ensure that the petition crumbles.

14. It is stated in the affidavit sworn by Feisal Bare Hassan that on 5th September, 2017, the Petitioner, her advocates and supporters were at Tana Gardens Hotel Room 202 and documents were signed but cannot identify the documents but believes the documents were signed in there but cannot identify which documents but believes the documents related to this petition but can identify the people who were in the said room.

15. It is averred in the affidavit of Idriss Omar Abdi that he saw Mr. Ian Maina Mbutia Commission the documents. That the affidavit of the said Mr. Ian Maina Mbutia is made in bad faith and it's intended to

jeopardize the petition. That the petition ought to be heard on merits and without overreliance on technicalities of procedure. It is further stated that the 3rd Respondent made efforts including sending elders to him to influence him from proceeding to testify herein and that the said tactics have been employed on the other witnesses.

16. It was submitted on behalf of the 3rd Respondent that the discovery of the matters in question came after the pre-trial conference had been concluded. It was further submitted that the discovery is on matters of illegality which cannot be over looked as it goes into the question of the jurisdiction of the court. That therefore sufficient cause has been shown as provided for under rule 15 of the Elections Petitions Rules. The court was referred to the following cases:

(a) Jamleck Kamau v Royal Media Services Ltd T/a Citizen Television [2016] eKLR

(b) David Wamatsi Omusotsi v The Returning officer Mumias East Constituency & 2 others Election [2017] eKLR

(c) Ibrahim Ahmed v Independent Electoral & Boundaries Commission & 2 others Election Petition H.C Nbi No. 21 of 2017

(d) Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited [1989] KLR 1

(e) Mapis Investment (K) Limited v Kenya Railways Corporation [2006] eKLR

17. It was further submitted that the evidence of the petitioner’s witnesses who swore affidavits in opposition to the application herein and were cross examined on the contents of the same were not credible and that they gave contradictory evidence which did not controvert the evidence of the Commissioner. The court was referred to the case of **Dominic Gichovi Alias Councillor v Republic [2014] eKLR**

18. Counsel for the 3rd Respondent submitted that there were differences between the application at hand and the ruling herein dated 4th December, 2017 in respect of the application dated 19th October, 2017. He stated that the Petitioner was cross examined on her signatures in the affidavit in support of the said application and her signatures in the affidavit in support of the Petition.

19. On who bears the burden of proof regarding the matters in question, the court was referred to Section 107 and 109 of the Evidence Act Cap 80 Laws of Kenya. Section 70, 71, 72 and 74 on the standard of proof required in respect of the attestation of the signatures.

20. The court was urged to strike out the affidavits in question and as a consequence strike out the Petition. Reference was made to Article 87 and 159 of the Constitution, Section 76 and 79 of the Elections Act Rules 5, 8 and 12 of the Elections Petitions Rules and Section 5 and 7 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya.

21. The counsel for the 1st and 2nd Respondent associated himself with the submissions made in support of the application. The thrust of his submissions is that rule 15 of the Elections Petitions Rules is not cast in stone and that sufficient cause has been shown. He pointed out what he stated were the disparities in the impugned signatures of the Commissioner and stated that one of the said affidavits did not have the signature of the Commissioner at all and that some of the witness did not swear any affidavits in support of the instant application. He submitted that the Commissioner gave evidence which is of high probative value and which remains uncontroverted on the issue of attestation and stated that the Petition is reflected as signed and commissioned in Nairobi while the affidavits in support are reflected as having been signed and commissioned in Garissa yet the Commissioner for Oaths is reflected as the same person.

22. The counsel for the 1st and 2nd Respondent while referring to the Petitioner’s list of authorities argued that the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3**

others [2013] eKLR justifies the entertainment of the application under consideration. He distinguished the Petitioner's following authorities:

(a) Chris Munge N. Bichage & 2 others v I.E.B.C & 2 others [2017] eKLR

(b) Joseph Obiero Ndiege v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR

(c) Francis Mwangangi Kilonzo v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR

23. On the Petitioner's side it is submitted that the Petitioner's witnesses who have been cross-examined on the issue of the attestation before the Commissioner have been consistent in their evidence and have disproved the evidence of the Commissioner. That the burden of proof lay on the Commissioner and that the court is not a document examiner to be subjected to a comparison of the questioned signatures.

24. It is further submitted that the affidavit of the Petitioner in support of the Petition has been adjudicated upon before this court and a ruling delivered on 4th December, 2017. That the court is therefore *functus officio* as it held that the said affidavit is properly on the record and the court cannot therefore re-open its own decision. The court was referred to the **Raila Odinga case (supra)**.

25. It is submitted that rule 15(2) of the Elections Petitions Rules is to some extent cast in stone as the mandatory word "**shall**" is used. That the affidavits in question have been on record since the date the same were served and the application could have been made before the close of the pre-trial conference. The court was told that there was no sufficient cause shown for the delay in filing the application and referred to the following cases:

(a) Joseph Obiero Ndiege (Supra)

(b) Francis Mwangangi Kilonzo (Supra)

26. The following cases were distinguished:

(a) David Wamatsi Omusotsi case (Supra) was distinguished as having relied on the case of **John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 others, Civil Appeal No. 102 2008** which was pointed out to be a pre-2010 decision. It was further submitted that since then there has been changes in the law,

(b) Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR which was referred to in **David Wamatsi Omusotsi (Supra)** and stated that it was overturned by the Supreme Court.

(c) Mapis Investment (K) Limited case (Supra) was referred to and it was submitted that there is no illegality in the case under consideration.

(d) Ibrahim Ahmed case (Supra) was distinguished as different in circumstances from the case at hand.

(e) Dominic Gichovi case (Supra) was distinguished as being a criminal case.

27. It was submitted that paragraph No. 3-10 of the affidavit of Daniel Ngaca Gacugia be struck out as the same refer to the affidavit of Yussuf Ahmed Muhumed that was struck off the record.

28. The court was referred to Article 159 (2)(d) of the Constitution, Section 80 of the Elections Act and rules 4 and 5 of the Elections Petitions Rules and urged not to strike out the Petition on the basis of technicalities of procedure as the Respondents have not demonstrated that they will suffer any prejudice.

It was submitted that if the affidavits are not properly commissioned, affidavits are not pleadings and the witnesses will be sworn during the hearing or leave granted for the filing of fresh affidavits. To bolster this argument, the court was referred to rule 24 of the Elections Petitions Rules which provides for the withdrawal of a Petition or the substitution of a Petitioner.

29. It was further submitted that election Petitions are matters of public interest and reference made to the case of **Jamleck Kamau (supra)**. The case of **Owners of the Motor Vessel "Lilian S" (Supra)** was referred to on the issue of jurisdiction.

30. The court was invited to look at the contents of the jurant page of the affidavits in question and told that it was not strange for the Commissioner to go to Garissa for a few hours.

31. One common thread in the submissions of the parties is rule 15(2) of the Elections Petitions Rules and it's import. Rule 15 provides for pre-trial conferencing and interlocutory applications. Rules 15(2) provides as follows:

"An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition."

32. The big question is whether the court has any discretion to entertain the application at hand, bearing in mind the aforesaid provisions of the law. It is clear from the record that the pre-trial conference herein was held on 6th December, 2017. On 8th December, 2017 the court gave directions on the hearing of the petition and marked the pre-trial conference as concluded. However, on 13th December, 2017 when the hearing of the Petition was to commence, one Advocate by the name Ian Maina Mbutia was in court and had filed an affidavit on the same day stating that he had not commissioned the affidavits in support of the Petition as alleged and that the same were forgeries. Although the pre-trial conference had been closed, this court could not close it's eyes to such grave allegations of illegality.

33. The court however bore in mind the provisions of rule 15(2) of the Elections Petitions Rules and directed that a formal application be filed before the court could consider the matter. Thus the instant application was filed as per the orders of this court made on 13th December, 2017. Under Section 80 of the Elections Act, the court has the power to summon witnesses and under Section 80(c) the Election Court can examine any other person not called as a witness and the said witness may be cross examined by the parties to the Petition.

34. This court has expressed itself herein on whether the court has any discretion under the Elections Act and the Elections Petitions Rules to entertain some of the earlier applications filed herein by the 3rd Respondent in an application for striking out the Petition on account of whether there was deposit for security and in an application whether the Petition as drawn complied with rule 8 of the Elections Petitions Rules. In dismissing the said applications, this court made reference to Article 159 of the Constitution Section 80 of the Elections Act, rules 4, 5 and 8 of the Elections Petitions Rules and various decisions of our superior courts and held that the court has discretion even in circumstances where there is use of the mandatory term "shall". I remain under the same conviction even in respect of Rule 15(2) of the Elections Petitions Rules. This court's directions given on the 8th December, 2017 at the close of the pre-trial conference left a window for the revisit of the directions given upon sufficient cause being shown. The application is therefore properly on the record. (See for example the case of **Ibrahim Ahmed (Supra)** where an application was entertained and succeeded after the close of the pre-trial conference. The cases of Joseph **Obiero Ndiege (Supra)**, Francis **Mwangangi Kilonzo (Supra)** and Chris **Munge N. Bichage (Supra)** are distinguishable in that they dealt with completely different circumstances)

35. It has been argued on behalf of the Petitioner that the court is *res judicata* on the issue of the affidavit sworn by the Petitioner in support of the petition. It was further argued that the court is now *functus officio* in respect of that issue. On 29th November, 2017 during the hearing of the application dated 21st October, 2017, the Petitioner was in court for purposes of being cross-examined on her signatures in the

aforestated two affidavits. This followed the application by Mr. Ngaca counsel for the 3rd Respondent in an application made on 27th November, 2017. The Petitioner was cross examined and the court subsequently delivered its ruling on 4th December, 2017.

36. In the ruling dated 4th December, 2017, this court held that the aforesaid affidavits were duly executed before a Commissioner for Oaths. However, the instant application seeks orders that the affidavit sworn on 5th September, 2017 and further affidavit sworn on 27th November, 2017 by the Petitioner in support of the petition and the affidavits of the petitioner's four witnesses, Yussuf Ahmed Muhumed, Ismail Mohamed Abdi, Sadiq Mohamed Gedi and the affidavit/certification of electronic evidence of Idriss Omar Abdi all sworn on 5th September, 2017 be struck out for non-compliance with the law as they were not sworn before a commissioner for Oaths.

37. The thrust of the argument by counsel for the 3rd Respondent is that the Commissioner for Oaths who is reflected in the said affidavits as having commissioned the same has disowned the said affidavits and described them as forgeries. These are allegations of illegality which are new matters before this court.

38. As stated by the Court of Appeal in **Mapis Investment (K) Limited (supra) Scott v Brown, Doering, McNab & Co (3), [1892] 2QB 724 Lindley LJ at p.728:-**

“Ex turpi causa non oritur action. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him”

39. The allegations of illegality go into the question of the competence of the petition before the court and therefore the jurisdiction of this court's continued hearing of the same on merits. The matter is therefore not *Res judicata* nor is the court *functus officio*.

40. In arriving at the aforesaid holding, I find support in the Supreme Court of Kenya exposition on the doctrine of *functus officio* where it was stated in **Raila Odinga (supra)** as follows:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

This principle has been aptly summarized further in **Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550:**

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”

41. During the hearing of the application under consideration, the Commissioner for Oaths Mr. Ian Maina Mbuthia was cross examined on the contents of his affidavit sworn on 13th December, 2017 which is one

of the affidavits in support of the application under consideration. He maintained his affidavit evidence that he was not in Garissa on 5th September, 2017 and that he did not sign or stamp the affidavits in question. On the other hand the Petitioner while answering questions during cross-examination stated that she was present when the affidavits were commissioned by Mr. Ian Maina Mbutia in Garissa but did not concentrate on everything that was happening. That she knew Mr. Ian Maina Mbutia by appearance and as the person who was with her Advocate, Mr. Irungu during the signing of the documents. This contradicts the position given earlier on by the Petitioner on 29th November, 2017 when during cross-examination in respect of her having signed the said affidavit of 5th September, 2017 she stated that she signed the documents and gave them to her advocate Mr. Irungu and did not concentrate on what happened thereafter during the stamping of the documents. On 29th November, 2017, the Petitioner talked of her presence during the signing and stamping of her documents while on 20th December, 2017, she talked about giving the documents to her advocate and the Commissioner for oaths who dealt with them.

42. The Petitioner has avoided stating directly in her evidence whether she saw the Commissioner signing. Indeed her affidavit evidence states in paragraph No. 13 that the commissioner was present when she was executing the documents. The question is whether the Commissioner signed the affidavits in question and not any other affidavit(s) or documents. The same can be said of the affidavits sworn by Feisal Bare Hassan and by Idriss Omar Abdi in opposition to the instant application. Mr. Feisal Bare Hassan stated in paragraph No 4 and 5 of his affidavit sworn on 19th December, 2017 that he could not identify which documents were being signed but stated that he was capable of identifying the people who were in the room during the signing, yet in the same breath told the court that he did not know the people who signed the affidavits in support of the Petition yet the said people were in the same room according to the evidence of the Petitioner and that of Idriss Omar Abdi. More intriguing is that both Feisal Bare Hassan and Idriss Omar Abdi in their evidence stated that the Petitioner signed the documents then they were signed by the Petitioner's advocate, Mr. Irungu then by the commissioner yet the affidavits in question only have two signatures on the same reflected as that of the deponent and the commissioner.

43. Mr. Idriss Omar Abdi's evidence during cross-examination in court is that he saw Mr. Ian Maina Mbutia the Commissioner signing the Petition as well as his affidavit and also came to know the Commissioner by name. In his affidavit, Mr. Idriss Omar Abdi stated in paragraph No. 4 that he saw Mr. Ian Maina Mbutia commission documents. The specific documents commissioned are not mentioned. The evidence of Mr. Idriss Omar that he saw the Commissioner signing the petition contradicts the position that the Petition was on the face of it reflected as signed in Nairobi.

44. After evaluating the evidence of the Petitioner and Mr. Feisal Bare Hassan, none controverts the evidence of the Commissioner that he did not sign the affidavits in question. Although Idriss Omar Abdi stated that he saw the Commissioner sign his affidavit, the evidence of the Petitioner and Feisal Bare Hassan states otherwise. The evidence of the Petitioner and her two witnesses is inconsistent, contradictory and not reliable. Without any credible evidence that the affidavit of the Petitioner was signed by the Commissioner, there was no need for the evidence of a document examiner in the circumstances of this petition.

45. It is also noted that other than the Petitioner and her husband Idriss Omar Abdi, the other witnesses who swore affidavits in support of the petition did not come to court to shed light on the issue of how the same were commissioned. That is Ismail Mohamed Abdi whose affidavit does not have the signature of the Commissioner and Sadiq Ahmed Gedi. The affidavit of Yussuf Ahmed Muhumed was earlier on struck out by the court as it was reflected as signed by a different person by the name Abdiaziz Yussuf Osman.

46. Under Section 108 and 109 of the Evidence Act, the burden of proof lies on the person who wishes the court to believe in the existence of a fact. Thus he who asserts must prove. The 3rd Respondent in my view had the burden of proof in this application and as held above, discharged the same to the required standard. As stated by the Supreme Court of Kenya in **Raila Amolo Odinga & another v IEBC & 2 others PRESIDENTIAL Petition No. 1 of 2017:**

“.....in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt”

47. In **Raila Odinga 2013 (supra)** the Supreme Court held as follows:

“It behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.”

48. With the foregoing, I hold that the affidavits in support of the petition are not affidavits in terms of Section 5 and 7 of the Oaths and Statutory Declarations Act and I hereby strike out the same. In that regard I am in agreement with the persuasive decisions in the **David Wamatsi Omusotsi (Supra)** and **Jamleck Kamau (Supra)**.

49. During the submissions by the Petitioner’s counsel, it was argued that defective affidavits or the Petitioner can be substituted or withdrawn taking into account that Election Petitions are of great public interest. However, even matters of public interest must be handled within the realms of the law. In any event, there is no application for substitution or withdrawal before the court. Any such application would also be contrary to the provisions of Article 87 of the Constitution and Section 76 of the Elections Act which provide for the filing of electoral disputes within 28 days after the declaration of results by IEBC.

50. Having struck out the affidavits in support of the Petition, I hold that there is no competent Petition before this court. The upshot is that the Petition is struck out with costs to the 1st, 2nd and 3rd Respondents.

Dated, signed and delivered at Nairobi this 28th day of Dec., 2017

B. THURANIRA JADEN

JUDGE